ORIGINAL

NO. 92-8841

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

KITRICH POWELL,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court's opinion in County of Riverside v. McLaughlin is legally relevant to Powell's allegation of a denial of his statutory right to a speedy arraignment.

2. Whether County of Riverside v. McLaughlin declared a new constitutional rule of criminal procedure so as to require the Nevada Supreme Court to apply McLaughlin pursuant to Griffith v. Kentucky.

3. Whether Powell waived his statutory right to a speedy arraignment when he received a Miranda warning and voluntarily agreed to speak with police officers without counsel being present.

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OPINION BELOW

The opinion of the Nevada Supreme Court is cited as Powell v. State, 838 P.2d 921 (Nev. 1992). Petitioner has included a copy in the appendix attached to his Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner, Kitrich Powell, was initially charged by way of criminal complaint with child abuse with substantial bodily harm. Following the death of the four year old abused child however, an amended criminal complaint was filed charging Defendant with murder.

A jury trial was held in the Eighth Judicial District of Nevada, and Defendant was found guilty of murder of the first degree. Following the penalty phase of the trial, the jury returned a verdict of death. On June 10, 1991, the trial court adjudged Defendant guilty and imposed the sentence of death. Petitioner then appealed to the Nevada Supreme Court.

In Powell v. State, supra, the Nevada Supreme Court affirmed Petitioner's conviction and sentence. The Nevada court held that the Petitioner waived his right to a timely arraignment when he waived his right to remain silent and his right to counsel.

Thereafter, Powell petitioned the Nevada Supreme Court for a rehearing. The State filed an answer agreeing that the Court should rehear but only for the purpose of deleting the Court's discussion of County of Riverside v. McLaughlin, ____ U.S. _____, 111 S.Ct. 1661 (1991) because it was irrelevant to Powell's argument regarding a violation of Nevada's speedy arraignment statute. The petition for rehearing was denied. The instant petition followed.

SUMMARY OF THE ARGUMENT

1. Petitioner claimed on appeal to the Nevada Supreme Court that his statutory right to a speedy arraignment had been violated. He did not raise the constitutional issue whether his right to a probable cause determination by a neutral magistrate for continued detention had been violated under Gerstein v. Pugh. This Court's opinion in County of Riverside v. McLaughlin is limited to Gerstein issues, not speedy arraignment issues. McLaughlin is therefore not legally relevant to Powell's case.

2. County of Riverside v. McLaughlin did not announce a new constitutional rule of criminal procedure and thus the retroactivicty analysis set forth in Griffith v. Kentucky is not applicable and the Nevada Supreme Court had no obligation to apply McLaughlin to Powell's case.

3. The Nevada Supreme Court discussed Powell's contention in the alternative and analyzed his argument after assuming his right to a speedy arraignment had been violated. The court thus did not refuse to consider McLaughlin (even though it is legally irrelevant to Powell's case. See Argument I).

A R G U M E N T

I

THIS COURT'S OPINION IN COUNTY OF RIVERSIDE V. McLAUGHLIN WAS LEGALLY IRRELEVANT TO POWELL'S DIRECT APPEAL TO THE SUPREME COURT OF NEVADA AND THEREFORE THE SUPREME COURT OF OF NEVADA HAD NO DUTY TO APPLY McLAUGHLIN TO ITS ANALYSIS OF POWELL'S UNTIMELY ARRAIGNMENT CLAIM

In his direct appeal of his conviction to the Supreme Court of Nevada, Powell argued that the State failed to comply with *Nev. Rev. Stat. 171.178*. See Respondent's Appendix (hereinafter referred to as R.A.), Exhibit 1. *Nev. Rev. Stat. 171.178* is Nevada's equivalent of *Fed. Rule of Crim. Proc. 5(a)*. See R.A., Exhibit 2. Inasmuch as Powell was arrested by the Las Vegas Metropolitan Police Department, paragraph one of said statute is the pertinent section to this case. In essence, *Nev. Rev. Stat. 171.178(1)* provides that a person arrested with or without an arrest warrant shall be taken before the nearest available magistrate without unnecessary delay. In discussing this statute, the Nevada Supreme Court has stated in Sheriff v. Berman, 659 P.2d 298 (Nev. 1983):

> *NRS 171.178* affords an arrested person a statutory right to be brought before a magistrate "without unnecessary delay." It does not directly import the federal constitutional guarantee of a speedy trial, and does not require the same

> interpretation that federal courts have given the similarly-worded *Federal Rule of Criminal Procedure 5(a)*. (citations omitted).
>
> The purpose of the statute is to prevent law enforcement personnel from conducting a "secret interrogation of persons accused of crime." Morgan v. Sheriff, 92 Nev. 544, 546, 554 P.2d 733, 734 (1976), quoting McNabb v. United States, 318 U.S. 332, 344 (1943). Speedy arraignment is primarily intended to ensure that the accused is promptly informed of his privilege against self-incrimination. (citation omitted).

659 P.2d at 300.

The Court went on to note that the mere passage of time between arrest and arraignment does not alone establish a deprivation of a defendant's statutory right. Rather the defendant must establish that prejudice resulted from the fact of delay. Id. More recently, in Huebner v. State, 731 P.2d 1330 (Nev. 1987), the Court also noted that the purpose behind *Nev. Rev. Stat. 171.178* "is to prevent 'resort to those reprehensible practices known as the "third degree" which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime.' McNabb v. United States, 318 U.S. 332, 344 (1943); (Nevada citations omitted)."

Powell was arrested on November 3, 1989 and charged with child abuse with substantial bodily harm. The petitioner claims he made statements to police on November 3, 1989, and on November 7, 1989. The conversation on November 3rd occurred prior to arrest and thus was not custodial. The interview on November 7th was custodial but Defendant received the Miranda admonishment prior to making a state-

ment. R.A., Exhibit 3. Although the Nevada Supreme Court described this statement as being prejudicial, Powell's answers attempted to minimize his involvement with the child's injuries. Also on November 7, 1989, a magistrate concluded that probable cause for continued detention existed. R.A., Exhibit 4. This proceeding was done to conform to Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975). On November 8, 1989, an amended criminal complaint was filed charging Powell with murder. R.A., Exhibit 5.

Powell was formally arraigned on the murder charge on November 13, 1989. R.A., Exhibit 6. It is this time period from his arrest on November 3, 1989 until his formal arraignment on November 13, 1989 that Powell challenged as a violation of *Nev. Rev. Stat. 171.178*. Powell never claimed that his right to a timely determination of probable cause by a neutral and detached magistrate under Gerstein v. Pugh had been violated. Had such a challenge been made it most likely would have been denied because, prior to this Court's enunciation of the forty-eight hour time period in McLaughlin, there was no specific time period mandated by this Court or the Nevada Supreme Court.

Although no Gerstein issue was presented to the Nevada Supreme Court for review, the Court, sua sponte, brought the decision of County of Riverside v. McLaughlin, ____ U.S. ___, 111 S.Ct. 1661 (1991), into its discussion of Powell's speedy arraignment claim under *Nev. Rev. State 171.178*. It appears to the State that the Nevada Supreme Court confused Gerstein with speedy arraignment. For example, the Court

stated: "We initially note that the United States Supreme Court has provided additional guidance on the issue of what constitutes a timely initial appearance (emphasis added). See County of Riverside v. McLaughlin, ____ U.S. ____, 111 S.Ct. 1661, 114 L.Ed. 2d 49 (1991).

Later, the Court stated, "The McLaughlin case renders *Nev. Rev. Stat. 171.178(3)* unconstitutional insofar that it permits an initial appearance up to seventy-two hours after arrest . . . ." Powell at 924. But the "additional guidance" this Court was providing in McLaughlin pertained to the outside time limit for a Gerstein probable cause determination for persons arrested without a warrant, not for an initial appearance (arraignment), which applies to all persons arrested with or without a warrant. Although the procedure utilized by the Court of Riverside combined Gerstein probable cause determinations with initial appearances, the forty-eight hour period this Court enunciated applies to Gerstein probable cause determinations.

Thus, County of Riverside v. McLaughlin has no bearing on Nevada's speedy arraignment statute. It only applies to Gerstein probable cause determinations. Should Nevada do as Riverside County had done and combine both proceedings into one, then persons arrested without a warrant would be entitled to a probable cause determination and arraignment within forty-eight hours.

Because Powell only claimed a statutory violation of *Nev. Rev. Stat. 171.178*, McLaughlin was not relevant to the issue presented on appeal. Consequently, the Nevada Supreme

Court was not remiss for failing to conclude that Griffith v. Kentucky, 478 U.S. 314 (1987) required it to apply McLaughlin retroactively to Powell's case.

II

THIS COURT'S DECISION IN COUNTY OF RIVERSIDE V. McLAUGHLIN DID NOT DECLARE A NEW CONSTITUTIONAL RULE AND THEREFORE THE RETROACTIVITY ANALYSIS OF GRIFFITH V. KENTUCKY DOES NOT APPLY

While petitioner is correct that this Court adopted Justice Harlan's retroactivity analysis in Griffith v. Kentucky, supra, thereby discarding the three-prong analysis set forth in Tehan v. United States, 382 U.S. 406 (1966), Griffith states, "In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. at 322. (emphasis added).

In Gerstein v. Pugh, supra, this Court held that the fourth amendment "requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest." McLaughlin, 111 S.Ct. at 1665. That case enunciated a newly declared constitutional rule of criminal procedure. In McLaughlin, however, no new constitutional rule was declared. All this Court did in McLaughlin was determine what "prompt" means in

terms of Gerstein. McLaughlin, supra, at 1665. Respondent submits that merely determining an appropriate time parameter to include in the Gerstein analysis does not constitute the declaration of a new constitutional rule of criminal procedure. The retroactivity analysis adopted in McLaughlin should therefore not be utilized. Thus, even if this Court should conclude that McLaughlin does have legal relevance to the issue Powell presented to the Supreme Court of Nevada, the holding of McLaughlin is not entitled to the generous retroactivity analysis set forth in Griffith, supra.

The three-prong test set forth in the footnote of the Powell opinion adequately protects the rights of criminal defendants when a new case does not articulate a new constitutional rule.

III

PETITIONER WAIVED HIS RIGHT TO A TIMELY ARRAIGNMENT WHEN HE WAS ADVISED OF HIS RIGHTS UNDER MIRANDA AND VOLUNTARILY WAIVED SAME

Assuming arguendo that McLaughlin is legally relevant to Powell's allegation that the State violated his statutory right to a speedy arraignment, that the retroactivity analysis adopted in Griffith v. Kentucky is the correct test to apply, and that the Nevada Supreme Court applied the wrong retroactivity analysis, Powell still fails to demonstrate that he is entitled to relief. He argues that the

Nevada Supreme Court failed to analyze Powell's direct appeal claim in light of McLaughlin. See Petition, p.3. His claim is based on the fact that, in footnote 1 of its opinion, the Nevada Supreme Court noted that the forty-eight hour period mandated by McLaughlin does not apply to Powell's case. Powell, 924, n.1.

Had that been the holding of the Nevada Supreme Court, then the discussion of Powell's claim would have ended right there and the contents of footnote 1 would probably have been in the body of the opinion. The Court would then have moved on to Powell's next issue, set forth at p. 925 under headnote 6. Instead, the Court, in three rather long paragraphs, explains why even if Powell's rights had been violated, he was still not entitled to relief. All of the Court's discussion under headnote 5 would be superfluous had the Court only relied on its opinion that McLaughlin was not retroactive to Powell's case.

Instead, the court, as an alternative argument, assumed Powell's speedy arraignment under *Nev. Rev. Stat. 171.178* had been violated and then explained that, because he had been given the Miranda warning and agreed to speak with the police officers, he thereby waived his right to a "seasonal arraignment." Powell at 924-925.

In so holding, the Court cited to Deutscher v. State, 601 P.2d 407 (Nev. 1979). That case cited to United States v. Indian Boy X, 565 F.2d 585 (9th Cir. 1977), cert. denied, 439 U.S. 841 (1978), United States v. Woods, 468 F.2d 1024 (9th Cir. 1972), cert. denied, 409 U.S. 1045 (1972), and

Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969), cert. denied 397 U.S. 1058 (1970). The reason for the rule is that because the primary purpose of an arraignment is to advise a defendant of his rights, a delay in arraignment is not prejudicial where a defendant has already been so advised. The Court also noted that Powell did not challenge the voluntariness of his statement to police. Powell at 925. Therefore, the rule enunciated in Deutscher, supra, was appropriately applied in Powell.

Petitioner dismissed the Nevada Supreme Court's waiver analysis by arguing that his detention had become illegal before his waiver was obtained. Petition, p.4, fn. 2. But Powell, on direct appeal, was not arguing a constitutional violation under Gerstein. He only complained of a statutory violation of his right to a speedy arraignment. Had Powell raised a Gerstein violation prior to the time he gave a voluntary statement to the police, his remedy, had he prevailed, would only have been release from custody, not dismissal of the case.

Powell's Gerstein probable cause determination occurred on the same day he gave his statement to the police. Once the magistrate found probable cause for continued detention, any Gerstein error was cured. Thus, by Tuesday, November 7, 1989, after his Mirandized statement and the magistrate's probable cause Gerstein determination, Powell had neither a Gerstein violation nor a speedy arraignment argument to make.

CONCLUSION

Petitioner had failed to show that there is any valid constitutional basis upon which this Court should invoke its discretionary jurisdiction. His Petition for Writ of Certiorari should be denied.

Dated this 26th day of July, 1993.

Respectfully submitted,

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By _____
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